No. 567

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

UNITED STATES, *Plaintiff in Error,*

vs.

FRED W. WERTZEL, *Defendant.*

MOTION BY DEFENDANT TO DISMISS.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

UNITED STATES, *Plaintiff*
vs.
FRED W. WEITZEL, *Defendant*
No. 567

MOTION BY DEFENDANT TO DISMISS.

Comes now the defendant in error, Fred W. Weitzel, and moves the Court to dismiss the writ of error herein for want of jurisdiction.

Defendant Fred W. Weitzel was the duly appointed, qualified and acting receiver of the First National Bank of London, Kentucky. He was indicted in the District Court for Eastern District of Kentucky, as *receiver* and *agent* of said banking institution, charged with the offense of embezzling certain funds and making false entries in certain reports required by law to be furnished the Comptroller of the Currency, while acting as such receiver, in violation of Section 5209 of the Revised Statutes, which provides that:

> "Every president, director, cashier, teller, clerk or *agent* of any association,

> who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any ~~injury or defraud the association or any~~ other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten."

The defendant filed demurrers to the indictments, which were sustained by the District Court on the ground that the receiver of a national bank appointed by the proper authorities of the United States Government, is not an agent of the banking association within the meaning of said section. The United States sued out a writ of error to this Court, seeking a reversal of the judgment of the District Court. The motion to dismiss the writ is upon the grounds that

the Supreme Court has not jurisdiction. Section 238 of the Judicial Code provides:

> "Appeals and writs of error may be taken from the district courts, including the United States District Court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prizes causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

We respectfully submit that this case does not come within the provisions of Section 238, Judicial Code. The writ of error should have been to the Circuit Court of Appeals, as provided in Section 128, Judicial Code.

Notice of this motion has been served on the opposing counsel.

A. E. STRICKLETT,
Attorney for Defendant in Error.

Durham W. Pickett
Atty for Defendant in Error

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 567.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRED W. WEITZEL, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

A. E. STRICKLETT,
Attorney for Defendant in Error.

JACKSON H. RALSTON,
Of Counsel for Defendant in Error.

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SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1917.

No. 567.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRED. W. WEITZEL, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT.

STATEMENT OF CASE.

The defendant in error, Fred W. Weitzel, was the duly appointed, qualified and acting receiver of the First National Bank, of London, Kentucky; on the 17th day of October, 1916, he was indicted in the District Court for Eastern District of Kentucky, as *receiver* and *agent* of the said banking association, charged with the offense of embezzling certain funds and with making false entries in reports required by law to be furnished the Comptroller of the Currency, while acting as such receiver. The indictments were returned under Section 5209 of the Revised Statutes of United States, which is as follows:

> "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report or statement of the association, with intent in either case to injure or defraud the association or any other company, body

politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The defendant filed demurrers to the indictments in the District Court, which were sustained on the ground that a receiver of a national bank, appointed by the Comptroller of the Currency, is not an agent of a banking association within the meaning of this section. The United States sued out a writ of error to this Court, seeking a reversal of the order of the District Court sustaining the demurrers and dismissing the indictments. The defendant in error filed a motion to dismiss the writ upon the grounds that the Supreme Court is without jurisdiction. The questions therefore presented to the Court are, First: Does a writ of error lie from the Supreme Court to the District Court of the United States to review the judgment of a District Court sustaining a demurrer to an indictment? Second: Is a receiver appointed by the Comptroller of the Currency to take charge of an insolvent national bank as provided by law, an agent of such banking association, within the meaning of Section 5209, Revised Statutes of United States?

ARGUMENT.

As to the first question, **"Does a writ of error lie from the Supreme Court to the District Court of the United States to review the judgment of a District sustaining a demurrer to an indictment?"** the grounds relied upon for dismissal of the writ of error are set out in the motion. We are proceeding upon the idea that the act approved March 3, 1911, known as the Judicial Code, is the only statute authorizing writs of error and appeals from the District Court direct to the Supreme Court of the United States. The Judicial Code prescribes the rules of civil and criminal procedure. Section 128, JUDICIAL CODE, provides as follows:

"The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

This section clearly provides that the decrees and judgments of the Circuit Court of Appeals shall be final in all cases arising under the criminal laws of the United States. The only cases that may be appealed or in which a writ of error may be sued out to the Supreme Court of the United States, direct from a decree or judgment of the District Court, are set forth in Section 238 of the Judicial Code, which is as follows:

"Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

In all cases except as provided in Section 238 of the Judicial Code, the Circuit Court of Appeals shall exercise

The words "president, director, cashier, teller, clerk, or agent" of banking association, are well-defined officials of a banking institution engaged in the regular conduct of its business; the status of receivers, on the other hand, is well defined in law. A receiver is the arm of the court that appoints him, or a receiver is the instrument of the Comptroller, and in either event, whether appointed by a court or by the Comptroller of the Currency, he is an indifferent person, not an agent or representative of either of the parties interested in the matter which he is appointed to take charge of. There can be no question about the application of the words "president, director, cashier, teller or clerk," as used in the statute; so that if a receiver is to come under the provisions of the statute at all, it must be included in the general term "agent" as used in the statute. We contend that the rule, "Where particular words of a statute are used in connection with general, the general words are restricted in meaning to objects of like kind with those specified" should be applied to the construction of this statute. In the case of TODD vs. UNITED STATES, 158 United States, 282, this Court said:

> "It is axiomatic that statutes creating and defining crimes can not be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. There can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the Statute."

Applying here the rule above quoted, clearly a receiver is not included in the statute under which the indictment was brought. The general term "agent," as used in the statute, then is restricted to employees of a solvent National Bank, in the regular and ordinary conduct of its business. The case of JEWETT vs. UNITED STATES, 100 Federal Reporter, 832, the rule contended for was applied by the Court. Jewett was the president of a National Bank and without formally resigning his office, he was constituted the agent of the banking association to close its affairs in liquidation, as provided by the Revised Statutes, Sec. 5220. The offense for which he was indicted was committed while he was acting as such agent.

He was described in certain counts of the indictment as "an agent to assist such association in such liquidation," that as such agent he "had authority from the association to collect all its credits." The Court said:

> "These allegations show that the authority given Jewett with reference to certain very important matters connected with closing the affairs of the association, if not to all of them, was as extensive as that which would have vested in its president and directors if no agent had been appointed.
>
> "Therefore, as we have already said, the spirit of the statute reaches the case. Consequently we are not justified by any rule of construction in so far clipping the letter of the statute, which expressly uses the word "agent," as to exclude this case from its purview. Of course, the rule noscitur a sociis applies here as everywhere; and when the statute groups representatives of the corporation in the following language, "president, director, cashier, teller, clerk, or agent," we are not permitted to hold that one occupying the position of the plaintiff in error is excluded from the classes of persons within its purview, however it might be with some one exercising temporary or special authority, who would not, in the mind of the legislature, be commonly associated with the recognized officers of the bank."

In the case just cited, the defendant was held to come within the provisions of the statute, because he was the chosen agent of the bank, with powers as extensive as those vested in the president or directors; the very source of his appointment brings him within the provisions of the statute, and is within the well-defined status of an agent, and is distinguished from "one exercising temporary or special authority, who would not in the mind of the legislature be commonly associated with the *recognized officers of the bank.*

In the case of UNITED STATES vs. HARTWELL, 6 Wallace, page 385, the Court had under consideration a question very similar to the one in the instant case; the defendant was described in the indictment as clerk in the office of Assistant Treasurer at Boston, and as such was indicted for embezzlement. Seven counts of the indictment were founded on the following section of the Sub-Treasury Act:

"If any banker, broker, or any person, not an authorized depositary of public moneys, shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate or apply any portion of the public money for any purpose not prescribed by law, or shall counsel, aid or abet any disbursing officer or collector of internal revenue or other agent of the United States in so doing, every such act shall be deemed and adjudged an embezzlement of the money so deposited, loaned, transferred, used, converted, appropriated, or applied; (and any president, cashier, teller, director, or other officer of any bank or banking association who shall violate any of the provisions of this act shall be deemed and adjudged guilty of embezzlement of public money), and punished as provided in section two of this act.

The Court said:

"The penal sanction with which the section concludes is as follows: 'And any president, cashier, teller, director, or other officer of any bank or banking association, who shall violate any of the provisions of this act, shall be deemed and adjudged guilty of an embezzlement of public money, and punished as provided in section two of this act.'

"This clause is limited in its terms to the officers named in it. There is nothing which extends it beyond them. It can not, by construction, be made to include any others. It is confined to officers of banks and banking associations. The defendant is not brought within the act by the averments contained in the counts of the indictments, which are founded upon it. They describe him only as a clerk in the office of the assistant treasurer at Boston. As such, the act does not affect him, and the court has no jurisdiction of the offences charged. These counts are, therefore, fatally defective."

In line with the authorities above cited is the case of STATE vs. HUBBARD (Supreme Court of Kansas), 51 PACIFIC 290; we quote from the decision the following:

"A. D. Hubbard was indicted for embezzlement. Hubbard was appointed receiver by the district court. It was charged that as receiver he embezzled. The question was whether a receiver who unlawfully appropriates money which comes into his hands as receiver, or fails to account for or pay over the same on demand, is subject to prosecution and punishment as for embezzlement.

"The defendant was prosecuted upon the theory that he was an agent and under that portion of paragraph 2220 of the compiled laws of 1889 which provides that 'if any agent shall neglect or refuse to deliver to his employer or employers on demand any money, etc.,' which may or shall have come into his possession by virtue of such employment, office or trust."

The Court said:

"Is a receiver an agent within the meaning of the quoted section? The contention of the defendant is that the relation of agency, as ordinarily understood, does not exist between a receiver and the court which appoints him or the parties for whom he acts. A majority of the court agree with this contention and are of the opinion that the receiver is not an agent within the meaning of the statute. It is held that in construing a criminal statute words must be given their ordinary meaning unless it is clear that another was intended, and that to place receivers in a class with agents requires an unusual and strained construction of the statutory language. It does not appear that receivers have ever been designated as agents in our statutes or in the decisions of the courts, and as an evidence that they were not within legislative contemplation attention is called to the fact that in the first part of the section mention is made of executors, administrators, guardians and others vested with official functions somewhat similar to those exercised by receivers, but no mention is made of receivers. It is argued that if the legislature intended to make receivers subject to the penalties of that statute they would have specifically enumerated them with the others of the same general class. . . . . Can it be said that the court is the employer of the receiver, or that he is employed by the parties to the action wherein the receiver is appointed? The Court does not pay the receiver and is not an employer as the term is ordinarily understood. So it is said that the parties

litigant can not be said to have employed him, because they did not consent to his appointment and he does not act under their orders or direction.

"A receiver is generally regarded as an officer of the court and subject to its orders and directions. The property or money which comes into his hands as such officer is regarded as being in custodia legis, to be delivered or paid over to those who may establish a right to the same. He stands in an indifferent attitude, not representing the plaintiff or the defendant, but really representing the court and acting under its direction for the benefit of all the parties in interest. He has no powers other than conferred by his appointment, and being but the hand or arm of the court itself, the conclusion is that he does not stand in the relation of agent to the court or to the parties in litigation."

In the case of WITTERS vs. SOWLES, 32 FED. 762, the Court said:

"Examiner is an officer of the Government. The bank examiner had taken charge upon failure and he advised the bank to take a mortgage from the cashier. It was later attempted to have this mortgage set aside and it was contended that notice on the part of the examiner and also of the receiver was notice to the bank.

"The bank examiner was not an officer or agent of the bank and he had no authority, as such, to act for the bank in any manner. He represents a department of the government which supervises and controls the banks, as to whether in certain cases they shall do business at all or not, but it does none for them other than to wind up their affairs for their creditors."

Applying the rule laid down in the decisions of the courts cited above, as well as that of the text writers, to the case at bar, it requires a strained construction of the statute to bring the defendant within its terms. In sustaining the demurrers, the Court said: "No one can be said to be the agent of another unless he has been chosen expressly or impliedly to act for him and on his behalf. . . . . It is a case also for the application of the maxim, "Noscitur a sociis." A receiver of a National Bank is not appointed by the banking association;

he is appointed by the Comptroller under Section 5234, Revised Statutes. He is the instrument chosen by the governmental authority to accomplish certain specific things, and when those things are accomplished, the Comptroller then calls the shareholders together, and if they so will it, the receiver is discharged, and the institution is turned over to an agent chosen by them, the shareholders. But while the receiver is in charge he is an indifferent person, exercising his functions in the interest of no particular person or parties interested.

HIGH on RECEIVERS (3rd Ed.), Sec. 1, says:

> "A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation pendente lite, when it does not seem reasonable to the court that either party should hold it. He is not the agent or representative of either party to the action, but is uniformly regarded as an officer of the court, exercising his functions in the interest of neither plaintiff nor defendant, but for the common benefit of all parties in interest. Being an officer of the court, the fund or property intrusted to his care is regarded as being in custodia legis, for the benefit of whoever may finally establish title thereto, the court itself having the care of the property by its receiver, who is merely its creature or officer, having no powers other than those conferred upon him by the order of his appointment, or such as are derived from the established practice of courts of equity."

The same author in Section 360, in reference to receivers appointed by the Comptroller, says:

> "A receiver of a national bank appointed by the Comptroller, under this section of the act, is limited as to his functions by the object of the receivership and the duties which it involves. Practically such a receiver is the mere agent of the Comptroller of the Currency, for the purpose of bringing the residue of the assets into the United States Treasury. . . . ."

That a receiver is an indifferent person is recognized by the Courts. The case of KENNEDY vs. GIBSON, 8 WALL., page 505, the Supreme Court said:

> "The receiver is the instrument of the Comptroller. He is appointed by the Comptroller, and the power of appointment carries with it the power of removal."

And again in the case of IN RE CHETWOOD PETITIONER, 165 U. S. 458, this Court said:

> "The receiver acts under the control of the Comptroller of the Currency and the moneys collected by him are paid over to the Comptroller, who disburses them to the creditors of the insolvent bank."

In the case of TEXAS PACIFIC RY. CO. vs. BLEDSOE, 2 Texas Civ. Ap. 88, the Court defined the status of a receiver as follows:

> "Receivers are to be regarded, not as the agents of the railway company itself, but as the representatives of the court appointing them."

Again, in the case of Railway Co. vs. Geiger, 79 Texas, 13, in considering the liability of a railway company arising out of the negligence of its agents and servants, the Court said:

> "It is too clear that receivers in charge of and operating a railway are not, within the meaning of the Statute, either its servants or agents."

And in the case of BROWN vs. WARNER, 78 Texas, 543, the Court said:

> "The receiver is but the agent of the Court that appoints him."

In the case of BOOTH vs. CLARK, 17 Howard, 528, the Supreme Court of United States, in defining the legal status of a receiver, said:

> "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg. 355. He is an officer of the court;

his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. Delany v. Mansfield, 1 Hogan, 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court; Verplanck vs. Mercantile Insurance Company, 2 Paige, C. R. 452."

It is unnecessary to cite further authority to sustain defendant's position in this case. The authorities above cited amply sustain the ruling of the District Court, and therefore, the judgment sustaining the demurrers and quashing and dismissing the indictment should be SUSTAINED.

Respectfully submitted,

A. E. STRICKLETT,

Attorney for Defendant in Error.

JACKSON H. RALSTON,

Of Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

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SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

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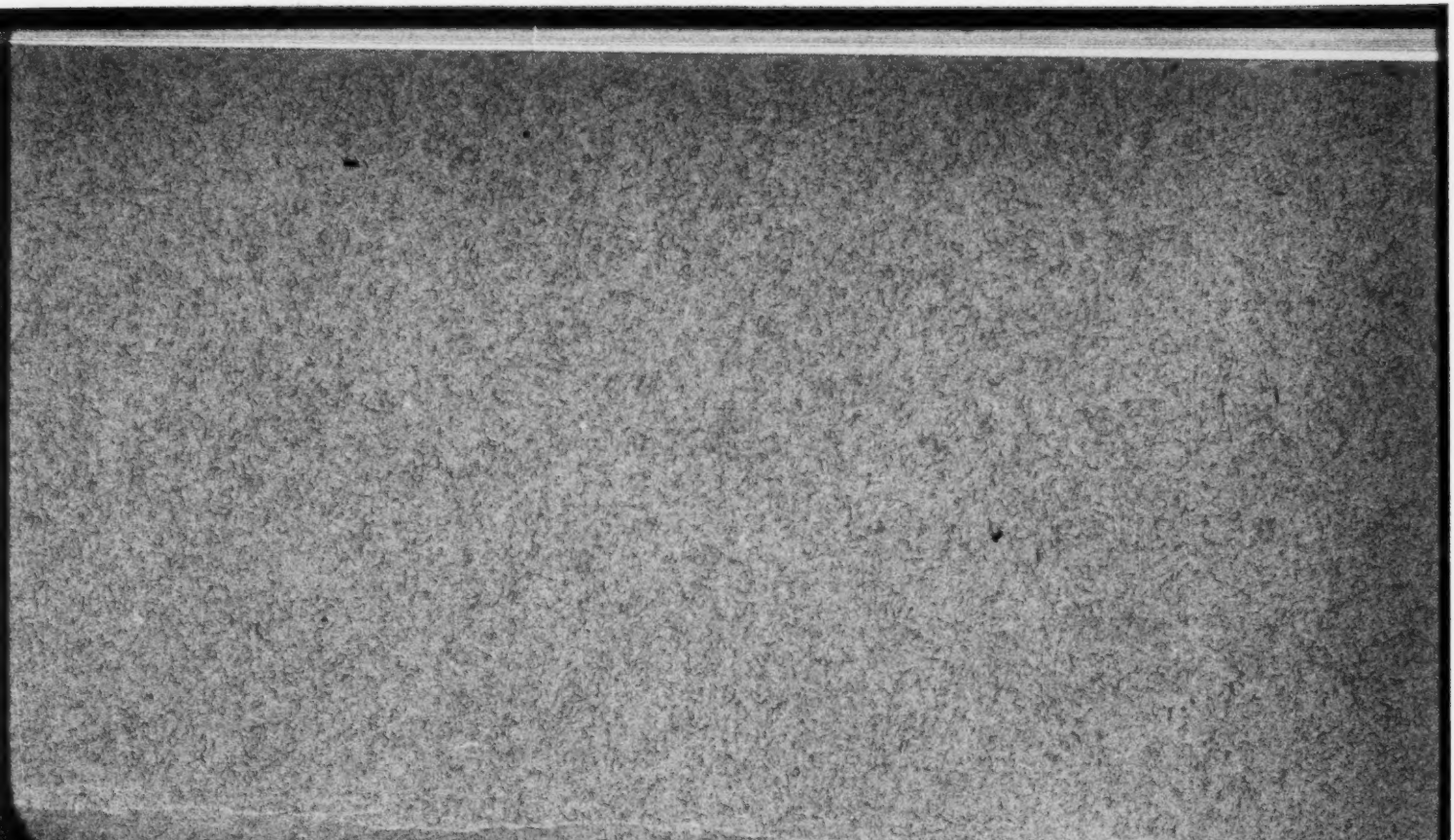

INDEX TO CASES CITED.

SUPREME COURT OF UNITED STATES,

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THE UNITED STATES, PLAINTIFF IN ERROR,

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SUPPLEMENTAL BRIEF.

Since preparing the original brief for the defendant in error in this cause, a typewritten copy of the brief of the Solicitor General has been handed me.

We want to emphasize the proposition advanced in our original brief, that a receiver appointed by the Comptroller of the Currency is in no respect a representative of the bank for which he is appointed to take charge. The Solicitor General has called attention to the conditions that may be the occasion for the appointment of a receiver by the Comptroller. The proposition that we have to deal with is rather the status of the receiver after his appointment. His duties are fixed by statute, and from his duties we may conclude his representative capacity. Section 5234 Revised Statutes sets forth clearly these duties.

Under the direction of the Comptroller, the receiver shall

(a) Take possession of the books, records and assets of every description of such association;

(b) Collect all debts, dues and claims belonging to it;

(c) Upon order of court of record of competent jurisdiction, may sell or compound bad or doubtful debts;

(d) Upon order of court of record of competent jurisdiction, may sell real and personal property of such association;

(e) If necessary to pay the debts of such association, enforce individual liability of the stockholders;

(f) Such receiver shall pay over all money to the Treasurer of United States, subject to the order of the Comptroller;

(g) Make report to the Comptroller of all his acts and proceedings.

After the receiver shall have performed his duties as set forth, then the Comptroller, under Section 5236 of the Revised Statutes, shall

(a) Provide for refunding to United States any deficiency in redeeming the notes of such association;

(b) Make ratable dividends of the money so paid over to him by the receiver on all claims proved or adjudicated;

(c) Pay balance of proceeds to shareholders or their legal representatives, in proportion to the stock held by them.

After the Comptroller has provided for conditions (a) and (b) above set forth, then the Act of June 30, 1876, provides:

". . . . the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said re-

ceiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharged in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this Act be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof."

The duties of the receiver and the Comptroller cease upon the execution of the deed or transfer as provided in this section, and then the duties of the agent selected by the shareholders of the association begin, and his duties are defined in Section 3 of Act June 30, 1876, to be as follows:

"Upon receiving such deed, assignment, transfer or other instrument, the person elected such agent shall hold, control and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond."

The final distribution of the assets are provided for in Sub-Sections 1, 2 and 3 of Section 3 of Act June 30, 1876, as follows:

First: To pay the expenses of the execution of the trust to the date of such payment.

Second: To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

Third: The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

It will be observed from the provisions of the statute, that the receiver's acts are absolutely under the control of the Comptroller, and in no respect does such receiver act independently, nor is he in any respect directly or indirectly accountable to the association or its shareholders. The Comp-

troller distributes the assets of the association after the same are put in the hands of the Treasurer, subject to the order of the Comptroller; after the agent is appointed by the shareholders as provided in the act of June 30, 1876, then the receiver's duties cease, and the agent of the association takes charge to wind up the affairs of the association and make final distribution of the money as provided in Sub-Sections 1, 2 and 3 of Section 3 of the Act approved June 30, 1876, *supra.*

The case of the UNITED STATES vs. CORBETT, 215 U. S. 233, cited by the Solicitor General is not in point. In that case the question involved turned upon who was included in the term "agent" used in that part of the section which penalizes false entries, "with intent . . . . to deceive . . . . any agent appointed to examine the affairs of any such association . . ." Under the National Bank Act the Comptroller of the Currency is empowered to exercise supervisory powers over national banks, and is empowered to appoint subordinates to examine national banks. This Court on page 243 said:

> "It is to be observed that the rule thus stated affords no ground for extending a penal statute beyond its plain meaning. But it inculcates that a meaning which is within the text and within its clear intent is not to be departed from because, by resorting to a narrow and technical interpretation of particular words, the plain meaning may be distorted and the obvious purpose of the law be frustrated. Bolles vs. Outing Co., 175 U. S. 262, 265, and especially United States vs. Union Supply Company, decided this term, *ante*, p. 50.
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> "Indeed, the aptness of the application of the principle just stated to the case in hand is well illustrated by the following considerations. If by distorting the rule of strict construction we were to construe the words of the statute, "any agent appointed to examine," so as to exclude the Comptroller of the Currency, the principal agent appointed for such purpose, by the same method we should be compelled to adopt the reasoning of the court below and to narrow the statute so as to exclude the intent to deceive by false entries in the report, an agent to whom the report was not to be made and who might not be called upon to

> examine the same, thus, in effect, as to intent to deceive any agent, destroying the statute. And this impossible conclusion at once serves to point out the correctness of the interpretation of the statute assumed in the Cochran case, that the intent to deceive, for which the statute provides, is an intent to deceive the official agents concerned in overseeing the bank and supervising its operation and the conduct of its business, including, of necessity, the Comptroller of the Currency and the subordinate agents or examiners whom the statute authorized him to appoint."

To have held that the Comptroller was not embraced in the class included in the words of the statute, "any agent appointed to examine," would in the Corbett case have practically defeated the purpose of the statute. But on the other hand, to hold that a receiver of a banking association, appointed by the Comptroller, is included in the term "agent" used in the statute in connection with "president, director, cashier, teller, clerk . . . . of any association," would be giving the statute a meaning not intended by the Congress.

In the case of MERCANTILE TRUST CO. vs. ST. LOUIS & S. F. RY. CO., 99 Federal Reporter, 489, 494, the Court said:

> "A receiver is an indifferent person, appointed by a court as a quasi officer or representative of the court, to take charge of, and sometimes to manage, the property in controversy, under the direction and control of the court during the continuance of or in pursuance of the litigation. The appointment of a receiver determines no right. He is a part of the machinery of the court by which equity protects and secures the rights of parties—all parties in interest. His custody is that of the law. Booth vs. Clark, 17 How. 322, 15 L. Ed. 164. When, therefore, the court concluded to assume jurisdiction, and to take the property into its custody, it became, not the right, but the duty of the court to place it in the hands of a receiver, its own officer, whose possession was its possession, and who should hold it, not for this party or that, but, as the representative of the law, for the protection of those whose rights should appear."

While the receiver in the last cited case was appointed by the court, yet the principle followed in that case is applicable to the case at bar. The receiver appointed by the Court is the arm of the Court, so a receiver appointed by the Comptroller of the Currency is "the instrument of the Comptroller." That there is no other Federal statute under which a defaulting receiver of a national banking association may be indicted is no reason for giving Section 5209 of the Revised Statutes a construction which was never intended by the Congress. If a wrong has been committed for which no penalty is prescribed, then it is the plain duty of Congress to remedy the evil by appropriate legislation, but never the duty of the Judicial Department to usurp the functions of the Legislative Department by extending the meaning of a statute by judicial construction, so as to include a class of persons foreign to the letter of the law, in order to provide the needed remedy. Such a condition, to use the words of the learned Solicitor General, would be "abhorrent to our conception of the principles of natural justice."

That the powers of a receiver and an agent are very much the same under the statutes is not conclusive that their representative capacity are similar. It is the paramount purpose of the receiver to convert the assets of the association into cash, turn it over to the Treasurer of the United States (a) to provide for refunding to the United States any deficiency in redeeming the notes of the association, and (b) to pay the claims proved or adjudged against the association, after accomplishing which the Comptroller then calls the stockholders together, and turns back the residue of the proceeds to an "agent" elected by the shareholders if they so determine, and thereupon the Comptroller and the receiver transfer all property to such "agent," who proceeds in form and manner by statute provided, to close up the affairs of the association. Thus it is seen that the appointment of an agent is by the shareholders whom he represents, while the receiver is appointed by the Comptroller of the Currency for the purpose of providing means for refunding the notes of the association and to pay its obligations. The relationship of agency imposes a duty on the agent to his principal, or the principal may impose his will on the agent in the performance of the services for which he

was employed. But a national banking association can not direct the receiver in the performance of his duties; the Comptroller of the Currency alone may direct the receiver, and to the Comptroller alone shall the receiver report his acts.

The Court is not concerned in this case as to whether a receiver of a national banking association is an officer of the United States. The Court is asked to decide a concrete case, and a decision of the question as to whether a receiver of a national banking association appointed by the Comptroller of the Currency is an officer of the United States is not necessary to determine the question involved in the case presented. But we concur in the conclusion of the Solicitor General that he is not such an officer. This has been determined in the cases of United States vs. Germaine, 99 U. S., 508, and United States vs. Monat, 124 U. S., 303.

It is true that in a few cases a receiver of a national banking association has been held to be an officer of the United States, but these decisions are limited to the construction of special jurisdictional statutes. (KENNEDY vs. GIBSON, 8 WALL. 498.)

We submit that the judgment of the District Court of Eastern District of Kentucky should be affirmed.

Respectfully submitted,

A. E. STRICKLETT,

Attorney for Defendant in Error.

JACKSON H. RALSTON,

Of Counsel for Defendant in Error.